NEO SON TONG REALITY SDN. BHD.

v.

KEE BA TEE

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 109 OF 1986]
10 DECEMBER 1986

LAND LAW: *Priority of caveats - Sale and purchase agreement between plaintiffs and vendor - Plaintiffs entered caveat - Agreement cancelled but caveat remained - 2nd agreement between same parties but no new caveat entered - Separate agreement between vendor and defendant and defendant entered a caveat - Application to determine which caveat should have priority - Whether caveat filed by defendant must be removed.*

This is an application by the plaintiffs to determine priority of caveats. The plaintiffs, pursuant to a sale and purchase agreement between themselves and the vendor, entered a caveat on 6 October 1984 but on 14 April 1986 this agreement was cancelled leaving the caveat to remain. On 15 July 1986 the plaintiffs entered into a 2nd agreement with the vendor.

In the meantime, on 26 November 1985 the vendor entered into a separate agreement with the defendant whereby it was expressly agreed that the vendor was to pay back the defendant the sum of RM30,000 on or before 26 August 1986, failing which the vendor undertook to transfer all his rights and interests in the said land to the defendant. On 26 August 1986 the vendor was unable to pay and the defendant filed a caveat against the said land.

Held:

[1] The plaintiffs' caveat had no meaningful existence as from 14 April 1986 because on that day the sub-stratum upon which it rested had disappeared.

[2] The defendant was lawfully entitled to caveat.

[3] The 2nd sale agreement gave the plaintiffs, when they had performed their side of the contract, a right *ad rem* which is also a right *in personam.* The plaintiffs only acquired a right to the land as against the vendor personally but not against the world as a whole. Only actual registration could do that. Therefore, it is the defendant's equity which must prevail because his right of action against the vendor had crystallised earlier than that of the plaintiffs.

[Application dismissed with costs.]

Cases referred to:

Ong Chat Pang & Anor. v. Valliappa Chettiar [1971] 1 MLJ 224
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53

Other sources referred to:

Sale and Purchase of Real Property in Malaysia, Visu Sinnadurai, 1984, p. 268

For the plaintiffs - Julie Lim Siew Bee; M/s. T.K. Lim & Co.
For the defendant - Tay Bee Choo; M/s. Sze-Ping & Tay

JUDGMENT

Mahadev Shankar J:

Gan Kim Chai is the registered proprietor of all that land held under HS (D) 1662 for Lot PTD 9578 in the Mukim of Plentong, Johor Bahru ("the said Land"). He used this land as leverage to obtain money firstly from the United Malayan Banking Corporation and also from the plaintiffs and the defendant in the circumstances which will shortly be set out. The Bank registered a charge against the said Land. The plaintiffs and the defendant registered caveats. This application is to determine which of these caveats should have priority and if the defendant's caveat should be removed, as prayed for by the plaintiffs in order to register a transfer of the said Land which has been executed by Gan Kim Chai in favour of the plaintiffs.

Now Gan Kim Chai has disappeared. As at 31 August 1986 the Bank aforesaid is owed RM79,267.44. The Bank's charge was the first registered encumbrance upon the said Land. The debt due to it is still owing and Counsel for the parties have informed me that foreclosure proceedings are imminent. So if the Bank is not paid the said Land will be sold and after payment to the Bank as a secured creditor, the balance will be left to be distributed amongst the unsecured creditors of Gan Kim Chai.

On 2 October 1984, the plaintiffs had entered into a sale & purchase agreement with Gan Kim Chai in respect of the said Land together with the building erected thereon. A sum of RM30,000 only was paid by the plaintiffs as deposit and towards payment of the purchase price of RM140,000. The balance was to be paid as provided in the sale & purchase agreement dated 3 October 1984. To protect their interests arising out of this Agreement and the part payment made as aforesaid, the plaintiffs registered the caveat against the said Land on 6 October 1984.

One of the terms of that sale & purchase agreement was that Gan Kim Chai would deliver vacant possession and by mutual agreement this was to be effected on 3 October 1985. But Gan Kim Chai was unable to do this and asked the plaintiffs for an extension up to 2 April 1986 to fulfil this obligation. The balance of the purchase price was agreed to be paid only after delivery of vacant possession.

But when 2 April 1986 arrived, Gan was still unable to deliver vacant possession and consequently on 14 April 1986 the plaintiffs and Gan Kim Chai executed a further document whereby it was confirmed that the sale & purchase agreement dated 3 October 1984 shall be treated as deemed to be cancelled forthwith as from 14 April 1986.

What happened to the RM30,000 which was paid as part of the purchase price is not explained in this document and there is no evidence before me either of that aspect of the matter.

Notwithstanding the cancellation of the Agreement the plaintiffs' caveat was allowed to remain on the register.

On 15 July 1986, the plaintiffs entered into a second sale & purchase agreement with regard to the said Land and the house thereon. This time the agreed purchase price was RM120,000 and the sale was free of encumbrances and with vacant possession. Upon the signing of this Agreement, the plaintiffs paid to Gan Kim Chai a sum of RM12,000 by way of deposit and part payment of the purchase price, and on the same day i.e., 15 July 1986 the plaintiffs paid as agreed a further part payment of the purchase price in the sum of RM28,000 thereby leaving the final balance of the purchase in the sum of RM80,000 hereafter called "the balance of the purchase price" This balance of RM80,000 was mutually agreed to be utilised to redeem the amount due to the Bank aforesaid.

I must point out here that these figures cannot be related to the sum of RM30,000 which had been paid earlier on account of the first sale & purchase agreement. The terms of the second sale & purchase agreement do not mention this money, and there is nothing there which suggests that it was taken into account. Consequently I must infer and find as a fact that the second sale & purchase agreement was a completely new and separate transaction.

In the meantime, on 26 November 1985, Gan Kim Chai borrowed from the defendant a sum of RM30,000 only in consideration of which Gan pledged as security all his legal rights and interests in the said Land together with the house thereon to the defendant. This transaction was reduced into writing and the document is dated 26 November 1985. It was also an express term of the Agreement between the defendant and Gan that the latter shall repay the said sum of RM30,000 within 9 months from the date of the Agreement, that is to say on or before 26 August 1986. In the event that repayment was not made as agreed, Gan undertook to execute and surrender to the defendant all legal documents necessary to effect a transfer of all his rights and interests in the said Land to the defendant with vacant possession and free from all encumbrances, but subject only to the charge of the Bank.

When 26 August 1986 arrived, the debt was not paid and the defendant consequently filed a caveat against the said Land.

This caveat of the defendant was found on the register when the plaintiffs' solicitors conducted a search at the Land Office on 4 September 1986. Its effect was to prevent the registration of a formal Memorandum of Transfer which Gan Kim Chai had executed on 23 August 1986 to the said Land.

Private attempts to get the defendant to remove his caveat failed, and the plaintiffs filed this application on 25 October 1986. In the first instance it was filed *ex parte.* I declined to hear the application until the defendant had been served. So this was done and the application was heard *inter partes* with evidence on affidavits being given by both sides.

Neither Counsel for either party have cited any authorities in support of their submissions.

For the plaintiffs, it was argued that since their caveat on the basis of the first Agreement was on the register as long ago as 6 October 1984, the plaintiffs were entitled to rely upon that caveat as giving notice to the world of their interests in the said Land. Consequently it was argued that at the time of the creation of the defendant's interests in November 1985, the defendant had to take subject to the plaintiffs' claims. It was further submitted that notwithstanding the cancellation of the first sale & purchase agreement in April 1986, the plaintiffs were entitled to rely on their caveat in protection of their interests which arose out of the second sale & purchase agreement.

The defendant's contention is that whilst he may have been adversely affected by the first caveat if the first sale & purchase agreement had been put through, the fact was that as of April 1986 that sale & purchase agreement had been cancelled. The defendant says that he did not lodge a caveat in November 1985 because at that time he only had a contingent interest in the property which would only have crystallised into a right to require the transfer of the property to the defendant on 26 August 1986.

In response to the plaintiffs' claim that the Memorandum of Transfer executed by Gan Kim Chai on 23 August 1986 gave them a superior right *in rem* against the Land as opposed to a mere right *in personam* of an unpaid lender, the contention of the defendant's Counsel is that as long as the defendant had not been paid, Gan Kim Chai could not sell the said Land.

The Bank is not a party to this application. It is usual to find a clause in bank charges which prohibits the chargor from dealing with the property in any way without the prior written consent of the Bank had and obtained. No light had been shed on this aspect of the matter.

The only question which I have to decide in this application is whether the defendant's caveat should be removed.

In his erudite work, *Sale and Purchase of Real Property in Malaysia* (1984) Dr. Visu Sinnadurai has made a near Herculean effort at trying to rationalise the principles applicable to cases like the present one. I must confess that I am in full agreement with his opening remarks at p. 268 that:

> The question as to the extent to which a caveat guarantees priority is a vexed one. Case law on this issue is not entirely clear even in the other jurisdictions where the Torrens system is applicable.

No useful purpose will be served in regurgitating all the cases he has submitted to critical analysis between pp. 268 and 280 of that work, especially as I am only concerned with the sole issue of whether the caveat filed by the defendant should be removed.

As to this it is my finding on the facts before me that the plaintiffs' caveat had no meaningful existence as from 14 April 1986 because on that day the sub-stratum upon which it rested had disappeared. The first sale & purchase agreement stood cancelled and with that the caveat filed to protect interests arising therefrom also had to go. We are dealing with equity here and equity regards as done that which ought to have been done. Consequently it cannot be used to cover interests arising under the second sale & purchase agreement made on 15 July 1986.

Gill FJ said in *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224 at p. 230B:

> ... the plaintiff in the present case did not obtain an equitable title to the land by virtue of the sale agreement. What he obtained was an equitable interest of a contractual nature in the land which he could protect by a restrictive entry in the Land Register. In other words he acquired a caveatable interest in the land.

Applying that principle to the defendant's situation his contractual right to have the said land transferred to him only arose on 26 August 1986. That right entitled him to file this caveat. Admittedly he would have had to file an action for specific performance to get a formal registrable transfer and pay off the Bank before he could get on the register but that is not the point. The point is whether the defendant was lawfully entitled to caveat. I think he was.

The next issue is whether any inspection by the plaintiffs of the Register before the conclusion of the second sale & purchase agreement and the execution of a formal transfer in favour of the plaintiffs invested them with an equity so superior to the defendant's that it entitled them to displace him from the Register. I think that the remarks of Gill FJ aforesaid and the effect of the cases he cited at p. 229 of the same judgment bear repetition. The second sale agreement like any other gave the plaintiff, when he had performed his side of the contract, a right *ad rem* which is also a right *in personam.* In other words he acquired a right to the land as against the vendor personally but not good against the world as a whole. Only actual registration could do that.

So the plaintiff may have been one step ahead in that he had actually got a registrable transfer executed in his favour in the statutory form, but otherwise the equitable rights of both parties were the same i.e. a right to claim the land from the vendor but with this vital difference. At the time the plaintiffs entered into their 2nd Agreement on 15 July 1986, the defendant already had an equity against the land albeit a contingent one.

As Gill FJ said in *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53:

> As to whether the subsequent interest of the appellants overrides the earlier right of the respondent the basic rule of law, as in equity, is that estates and interests primarily rank in order of creation. *Qui prior est tempore, potior est jure:* he who is earlier in time is stronger in law.

So not only was the defendant entitled to caveat as he did, but his right of action against Gan Kim Chai had crystallised earlier. It is therefore his equity which must prevail subject only to the paramount right of the Bank to enforce its charge if it is not paid.

This is not the place to speculate how the defendant should exercise his options, i.e., pay off the Bank and sue for specific performance, or get the plaintiffs to come to terms. The defendant has not asked for relief in this application and those issues must be decided, if need be, elsewhere.

So far as the plaintiff is concerned, the only proper order here is for me to dismiss this claim with costs.

Also found at [1987] 1 CLJ 207